TAN YOK KIM v. LEE WAI MUN

[F.C. (Gill CJ. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) April 1, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 127 of 1975]

Practice and Procedure — Application for summary judgment — Whether issues of fact and law to be tried — R.S.C., 1957, O.14.

The respondent had brought an action against the appellant and another person for the sum of $64,824 alleged to be due on a contract under which the respondent did some construction work for the appellant and the other person. The appellant and the other person were the partners of International Trade Exhibition Enterprise and the respondent had agreed to construct stalls and other structures at an international trade fair. There was a balance of $64,824 due on the contract and the appellant and his partner issued 3 cash cheques for $10,000 each but the cheques were dishonoured. The respondent then commenced action and applied for summary judgment under Order 14. The appellant and his partner in opposing the application said that they had entered into an earlier contract with Kee Nam Importers and Exporters and that the contract relied on by the respondent was between the respondent and Kee Nam Importers and Exporters and that the partnership firm was never a party to that contract. The learned Senior Assistant Registrar took the view that there were triable issues as to the contract under which the work was done and the proper party to be sued and she dismissed the respondent's application. On appeal to the High Court the appeal was allowed, the learned Judge holding that the contract was between the respondent and the appellant's partnership firm. The appellant appealed to the Federal Court.

Held, dismissing the appeal: there could not be any dispute as to what the proper contract was. The contract was between the respondent and the appellant's firm. In the circumstances there were no triable issues and the appellants were not entitled to be granted leave to defend.

FEDERAL COURT.

K. Chandra for the appellant.

M.T. Liew for the respondent.

Gill CJ. (Malaya) (delivering the judgment of the Court): This appeal arose from an action in the High Court at Kuala Lumpur in which the respondent, as plaintiff, claimed against the appellant and one Ho Choo, as the first and second defendants respectively, a sum of $64,824 alleged to be due on a contract under which the plaintiff did some construction work for the defendants.

The defendants were the partners of International Trade Exhibition Enterprise. The contract sued on arose in this way. The plaintiff wrote to the defendants to say that he was willing to accept the contract of constructing numerous stalls and other structures for use at the trade fair of the International Trade Exhibition Board at the Chin Woo Gardens, Jalan Davidson, Kuala Lumpur. The letter was received by the defendants on January 12, 1975. On January 14, 1975 the defendants wrote to the plaintiff accepting his offer. This letter was on a letter head of Kee Nam Imports and Exports but was signed by the International Trade Exhibition by its chairman, Ho Choo, who was also the managing director of Kee Nam Importers and Exporters. By a supplemental contract in writing dated January 27, 1975, the plaintiff at the defendant's request agreed to carry out certain extra work and to supply materials thereon upon the terms and conditions therein contained.

Under the contract, construction work was to commence on January 15 and was to be completed on January 28. The total cost of construction under the original contract was to be $85,000 and further sums of $5,000 and $1,500 were to be paid under the supplementary contract. The plaintiff duly carried out the contract and for the work done and for materials supplied he charged the defendants a sum of $90,500. He had made a deposit of $15,000 with the defendants under two receipts dated January 14, 1975, thus making a total of $105,000 as being due from the defendants. Between January 27 and March 3, 1975 the defendants paid the plaintiff a total sum of $40,676 leaving a balance of $64,824.

In purported part payment of the said sum of $64,824 the defendants issued 3 cash cheques for $10,000 each drawn on the United Malayan Banking Corporation Berhad but the cheques were dishonoured when presented for payment. The plaintiff gave due notice of such dishonour to the defendants and thereafter made repeated requests for payment. On the defendants failing to pay the said sum of $64,824, the plaintiff commenced his action on March 14, 1975.

On March 21, 1975 the plaintiff made an application to the Senior Assistant Registrar under Order 14 for leave to sign final judgment against the defendants. In his affidavit in support of his application he said that the defendants had no valid defence to his claim in the action. In opposing the application the first defendant filed an affidavit in which he stated as follows. The defendant firm had appointed Kee Nam Importers and Exporters to carry out the construction work under an earlier agreement dated December 22, 1974. The contract relied on by the plaintiff in support of his claim was made between the plaintiff on the one hand and Kee Nam Importers and Exporters on the other hand. The defendant firm was never a party to that contract. The cheques referred to in the plaintiff's affidavit were issued at the request of Kee Nam Importers and Exporters.

On the evidence before her the learned Senior Assistant Registrar took the view that there were triable issues as to the contract under which the work was done and the proper party to be sued. She therefore dismissed the plaintiff's application. The plaintiff appealed to the judge. Chang Min Tat J. allowed his appeal, setting aside the registrar's order and making an order that the plaintiff be at liberty to sign final judgment for the amount of his claim. From that decision of the learned judge the first defendant appealed to this court, there being no appeal by the second defendant.

In allowing the appeal the learned judge took the view that the document dated December 22, 1974, which was also written on the Kee Nam Letterheads and signed by Ho Choo as Managing Director of Kee Nam, was nothing more than a mere declaration by Kee Nam that it undertook the construction work for International Trade Exhibition Enterprise, that it was not in the nature of an offer by the International Trade Exhibition Enterprise to Kee Nam, and that in any event there was no acceptance of it so as to constitute a contract either between the defendant firm and Kee Nam or between the plaintiff and Kee Nam. The learned judge also took the view that Kee Nam could be the defendants only if the contract was given by them, for which the prior requirement was

that they must have acquired a right given to them by International Enterprise to give the contract to a third party, and this prior requirement had not been met. In the circumstances the dual capacity in which Ho Choo signed first as Chairman of International Trade Exhibition Enterprise and as Managing Director of Kee Nam could have no significance. As far as the plaintiff's offer was concerned, the acceptance was by Ho Choo as Chairman of International Trade Exhibition, which he undoubtedly was. Ho Choo was therefore sued correctly and in his proper capacity, as was Tan Yoke Kim the first defendant.

The appeal before us was made on several grounds the essence of which was that the learned judge ought to have held that there were issues of fact and law to be tried so that the defendants should have been granted leave to defend. In our judgment there were no triable issues in the case. We did not think there could be any dispute as to what the proper contract was. That contract was between the plaintiff and the defendant firm. It was a contract which came into operation by the plaintiff making an offer and the defendant firm accepting it. The plaintiff did his work under that contract. In relation to the amount which he claimed for the work done, a substantial sum had been paid by the defendants who had also issued three cheques. It was true that they were cash cheques and not cheques made out in the name of the plaintiff but they were delivered to him and they were produced by him. In the circumstances, as was pointed out by the learned judge when he dealt with the appeal, the defence was obviously a subterfuge.

After the decision of the Senior Assistant Registrar was made the defendants filed a statement of defence in which they raised the additional issue of faulty construction. The learned judge was not confident whether this issue was properly before him but he expressed the opinion that it did not in any event inspire any idea that such an after-thought raised a triable issue. We entirely agreed with that opinion of the learned judge.

We therefore dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Dato' S.P. Seenivasagam & Co.; Chung & Huang.*

NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION & ORS. v. SOUTH EAST ASIA FIRE BRICKS SDN. BHD.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) April 14, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 87 of 1975]

Industrial Law — Strike — Whether legal — Whether workmen have broken their contract of employment by going on strike — Rights of trade union — Industrial Relations Act, 1967, s. 12(7) — Employment Ordinance, 1955, ss. 8 and 15(2).

Administrative law — Application for certiorari — Jurisdiction of High Court — Findings of fact by Industrial Court — Whether strike legal — Whether workmen have broken their contract of service by going on strike — No error of law in findings of Industrial Court.

This was an appeal from the decision of Abdul Hamid J. ([1975] 2 M.L.J. 250). On February 4, 1974, 73 workers of the company stopped work and went on strike. The apparent cause of the strike was that the management of the company had repeatedly ignored the requests of the trade union for recognition and to commence negotiation for collective bargaining of terms and conditions of employment. The stoppage of work ended on February 16 when the dispute was referred to the Industrial Court on February 12, 1974. In the meantime the management had issued two warning notices to the strikers that the stoppage of work was a sudden wildcat strike and was illegal and a break in service and unless they returned to work within 48 hours their services would be deemed to be terminated. When the members reported for duty again on February 16, 1974, the company refused to accept them. The Industrial Court found that the workers by going on strike did not terminate their contracts of service; that the company in refusing to reinstate them had declared a lock-out and that the strike was legal. It therefore made an award that the workmen be reinstated on the same terms and conditions of employment with effect from February 16, 1974. The company applied to the High Court for an order of *certiorari* to quash the decision of the Industrial Court contending that the Industrial Court had erred in law in coming to the findings it did. The learned judge upheld the company's application and quashed the award. The trade union appealed to the Federal Court.

Held, allowing the appeal: (1) the circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. For instance, it has no jurisdiction to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face of the record;

(2) section 8 of the Employment Ordinance, 1955, has removed the provisions of section 15(2) of the Employment Ordinance from the scene of trade disputes. That provision can be safely overlooked when dealing with the activities of a registered trade union, as such activities for instance a strike in contemplation or in furtherance of a trade dispute are protected;

(3) all the necessary ingredients of the definition of strike existed in the present case and the stoppage of work on February 4, 1974 amounted to a strike. The Industrial Court was not in error in finding that the workmen had gone on strike and that the strike was legal;

(4) the Industrial Court was also not in error in holding that the company in refusing to reinstate the workmen had declared a lock-out;

(5) workmen are entitled to withdraw their labour by concerted action for any lawful purpose connected with management. Workmen who down tools do not risk the loss of their employment. The contracts of service are suspended by the strike, they are not terminated and the workmen are entitled to be put back to the *status quo* on the same terms and conditions;

(6) the company could not by issuing the warning notices and thereby imposing a new term of service convert the absence from work of the workmen who had gone on strike into abandonment of their contracts of service.

Cases referred to:-

(1) *Wong Mook* v. *Wong Yin & Ors.* [1948] M.L.J. 41.

(2) *Crofter Hand Woven Harris Tweed Company Limited & Ors.* v. *Veitch & Anor.* [1942] A.C. 435, 463.

(3) *Conway* v. *Wade* [1909] A.C. 506, 513.

(4) *Rookes* v. *Barnard* [1964] 1 All E.R. 367, 381.

FEDERAL COURT.

D. P. Xavier (*G. Vadiveloo* with him) for the appellants.

Ronald Khoo (*V. T. Nathan* with him) for the respondents.

Raja Azlan Shah F.J.: This appeal is directed against the judgment of the High Court reported in [1975] 2 M.L.J. 250 setting aside the award of the Industrial Court made on August 8, 1974. The parties